IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:	)	
	)	
MICHAEL W. UTTERBACK,	)	**Case No. 01-42251**
	)	**Chapter 7**
Debtor.	)	
	)	
	)	
COLUMBIAN NATIONAL TITLE INSURANCE COMPANY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Adversary No. 01-7130**
	)	
MICHAEL W. UTTERBACK,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

This matter is under advisement after trial of Plaintiff Columbian National Title Insurance Company's Complaint to Determine Dischargeability of Debt owed by Debtor, Michael W. Utterback, pursuant to 11 U.S.C. §§ 523(a)(2)(A), (a)(4) and (a)(6). The Court has conducted an evidentiary hearing in this matter, judged the credibility of the witnesses, and made an independent review of applicable law. The Court has jurisdiction to hear this matter, and to enter a final order.[1]

I. FINDINGS OF FACT

1. The Debtor is the sole officer and shareholder of Touchstone, Inc., a Kansas Corporation he started in 1997 to engage in the construction business.

[1] 28 U.S.C. § 157(b)(2)(I) (core proceeding), 28 U.S.C. § 1334 and 11 U.S.C. § 523(c).

2. In October 1999, Touchstone entered into a contract with Orval and Ladonna Williams to build them a home in Sedgwick County, Kansas on land they already owned.

3. The Williamses transferred the land to Touchstone, and Touchstone in turn mortgaged the land to Prairie State Bank ("Prairie State") to secure a line of credit to cover the construction costs for the new house.

4. The mortgage was properly recorded with the Sedgwick County Register of Deeds.

5. As the home was built, Touchstone drew on the line of credit to pay for construction costs.

6. The Williamses purchased the house and the land from Touchstone on September 1, 2000.

7. As part of the process of purchase, the Williamses secured title insurance from Columbian National Title Insurance Company ("Columbian").

8. At the closing on the house, the Debtor, as President of Touchstone, signed an "affidavit and agreement" that contained the following provisions:

    3. There are no outstanding unpaid bills for services, labor or materials used in the construction or repair of buildings and improvements on said real estate. Affiants (sic) further state all construction and/or repair of buildings and improvements on said real estate has been fully completed and accepted by owners.

    4. There are no outstanding unpaid and/or unreleased Title I or Title II house or improvement loans, chattel mortgages, conditional sales contracts, security agreements, financing statements, continuation statements or other documents or instruments evidencing a secured interest in any chattel or fixture located in or upon said premises described above.

    5. This affidavit is made and delivered in connection with the sale and/or mortgage of said real estate and is expressly for the benefit of any and all person or persons relying hereon, including but not limited to principals and their agents who are parties to this transaction.

    NOTE: Paragraphs No. 6 and 7 apply in addition to the above only if mortgage title insurance is issued.

6. The affiants (sic), parties hereto, hereby request the issuance of mortgage title insurance upon said real estate without exception therein as to any possible unfiled mechanic's or materialman's liens and any unreleased improvement loans, security agreements, financing statements, continuation statements or other instruments or documents evidencing a secured interest in said real estate, and in consideration thereof and as an inducement therefor, said affiant does hereby jointly and severally, agree to indemnify and hold such title insurance underwriter harmless of and from any and all loss, cost, damage and expense of every kind, including attorney's fees, which such title insurance underwriter may suffer or incur or become liable for under its said policy or policies now to be issued, or any re-issue, renewal or extension thereof, or new policy at any time issued upon said real estate, part thereof or interest therein, arising, directly or indirectly, out of or on account of any such mechanic's or material man's liens or other lien or claim or claims and/or such filings under the Uniform Commercial Code, in connection with its enforcement of its rights under this agreement.

9. Columbian issued the title insurance without an exception for the properly recorded Prairie State mortgage.

10. The Debtor did not read each of the documents at the closing on the sale of the house and did not specifically notice the fact that the mortgage to Prairie State was not included as an exception to the title insurance.

11. The Debtor did not recall signing the affidavit and agreement, but does not contest the fact that he did so. The Debtor testified he likely just signed the documents and left the closing, as he had done at numerous other closings.

12. Prior to issuing the title insurance policy, Columbian either did not conduct a search of the mortgage records recorded at the Sedgwick County Recorder of Deeds office to see if any liens or mortgages had been filed against the property, or failed to note the mortgage while conducting the search.

13. Instead, Columbian claims it relied upon the affidavit signed by the Debtor, which it contends states there are no outstanding liens against the property, when issuing the title insurance policy.

14. At the closing on the property, Touchstone received a check for $67,110, representing the remaining amount due under the contract with the Williamses. Prairie State was not included as a payee on the check.

15. The Debtor deposited the check from the sale of the property into Touchstone's general operating account and exclusively used the funds to pay other business debts.

16. The Debtor planned on repaying the debt to Prairie State, but was unable to do so when he was unable to collect on debts from other businesses who went out of business while still owing money to Touchstone.

17. At some point after the closing, Debtor contacted Prairie State Bank asking for an extension of the note, providing further evidence that Touchstone fully intended to still repay the mortgage note.

18. As a result of the Debtor's failure to repay the loan to Prairie State and Columbian's failure to except the loan from its title insurance policy, Columbian was forced to pay off the debt in the amount of $71,160.

II. ANALYSIS

Columbian filed this case seeking non-dischargeability of the debt owed to it by the Debtor pursuant to 11 U.S.C. § 523(a)(2)(A),[2] § 523(a)(4), and § 523(a)(6). The Court will address each of these claims separately.

Before doing so, it is important to note that the purpose of bankruptcy is to allow a debtor to have a financial "fresh start." However, the Bankruptcy Code does not provide a blanket fresh start for all debtors for all reasons. In fact, § 523 provides an express list of debts that are nondischargeable in a Chapter 7 bankruptcy. Section 523 balances the competing policies of allowing a fresh start and preventing a debtor from prospering from his own fraud.[3]

A. Standard of Review

[2]All statutory references are to the Bankruptcy Code, 11 U.S.C. § 101, et seq., unless otherwise specified.

[3]*Field v. Mans*, 157 F.3d 35, 44 (1st Cir. 1998).

The burden of proof rests with the party opposing the discharge. Thus, in this case, the burden of proof, by a preponderance of the evidence, is on Columbian.[4] Discharge provisions will be strictly construed against the creditor and, because of the fresh start objectives of bankruptcy, doubt is to be resolved in Debtor's favor.[5]

B. The Debtor did not engage in conduct that would cause this debt to be non-dischargeable under § 523(a)(2)(A).

Section 523(a)(2)(A) of the Bankruptcy Code provides an exception to discharge if a debt was obtained by "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." The creditor must prove, by a preponderance of the evidence, (1) that debtor made a false representation; (2) that debtor made the representation with intent to deceive the creditor; and (3) that the creditor, to his resulting detriment, justifiably relied on this representation."[6] A debtor's intent to deceive a creditor in making false representations, within the meaning of the fraud discharge exception, may be inferred from the totality of circumstances, or from a knowingly made false statement.[7]

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[4]*See Grogan v. Garner*, 498 U.S. 279, 291 (1991) (holding that preponderance of the evidence standard, not clear and convincing standard, applies to all exceptions to discharge); *see also In re Turner*, 266 B.R. 491 (10th Cir. B.A.P. 2001), *citing Jones v. Jones (In re Jones)*, 9 F.3d 878, 880 (10th Cir. 1993).

[5]*In re Perkins*, 298 B.R. 778, 787 (Bankr. D. Utah 2003) (citing *In re Kaspar*, 125 F.3d 1358, 1360 (10th Cir. 1997)).

[6]*Lang v. Lang (In re Lang)*, 293 B.R. 501, 514 (10th Cir. B.A.P. 2003); *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1373 (10th Cir. 1996).

[7]*Young*, 91 F.3d at 1374.

The Court finds that Columbian has shown that it relied on Debtor's statements in the affidavit in closing the loan,[8] and that Columbian was harmed because it then elected to not provide an exception to the Prairie State mortgage. Columbian was then required to pay off the mortgage. However, the Court finds, as more fully discussed below, that Columbian failed to prove both that the statements made constitute a fraudulent misrepresentation or omission and failed to prove that the Debtor acted with the intent to deceive Columbian or anyone else.

1. Columbian failed to prove that Debtor made any a fraudulent misrepresentation or omission.

Columbian contends that Debtor's statements contained in the "affidavit and agreement," which he signed at the time the sale to the Williamses was closed, contained fraudulent misrepresentations or omissions. Columbian does not point to the specific language in the affidavit that it contends was fraudulent, instead generally relying on four paragraphs in the affidavit to support its position.

The Court finds that the first paragraph relied upon by Columbian, paragraph 3 in the affidavit, does not contain any fraudulent misrepresentations. That paragraph states:

> There are no outstanding unpaid bills for services, labor or materials used in the construction or repair of buildings and improvements on said real estate. Affiants further state all construction and/or repair of buildings and improvements on said real estate has been fully completed and accepted by owners.

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[8]Judge Pusateri, in denying Columbian's motion for summary judgment in this case, stated "Title insurance companies are in the business of insuring the quality of title to real property and, at least as the Court understands it, they investigate the record to the real property before they insure it, and rely on their findings to determine what exceptions to include in their policy." (Doc. No. 28) This Court is similarly astonished that any title company would choose not to check recorded documents and instead choose to rely on an affidavit which, as noted below, is not the model of clarity. Thus, whether Columbian's reliance was justified is questionable, but the Court need not decide that because of the Court's finding on the other elements.

At issue in this case is a recorded mortgage by Prairie State against the property. Nothing in paragraph 3 of the affidavit relates to a recorded mortgage. This provision is clearly meant to deal with mechanics' liens, which may or may not be recorded at the time of a house closing. Further, Debtor's failure to affirmatively insist that Prairie State's name also be inserted, with Touchstone's, on the check received at closing, did not involve any "unpaid bills for services, labor or materials used in the construction or repair of buildings and improvements on said real estate." In addition, there is no evidence that the construction of the house was not complete and accepted by the Williamses. Therefore, nothing contained in paragraph 3 constitutes a fraudulent misrepresentation or omission as it relates to the Prairie State mortgage.

The Court similarly finds that paragraph 4 of the affidavit contains no statements by the Debtor that supports Columbian's position. Paragraph 4 states:

> There are no outstanding unpaid and/or unreleased Title I or Title II house or improvement loans, chattel mortgages, conditional sales contracts, security agreements, financing statements, continuation statements or other documents or instruments evidencing a secured interest in any chattel or fixture located in or upon said premises described above.

By signing the affidavit with the language in this paragraph, Debtor makes numerous representations, but none relate to the mortgage by Prairie State. "Title I and Title II house or improvement loans" are loans that are guaranteed by the Federal Housing Administration (FHA) for certain purchases and improvements to homes. A"chattel mortgage" is "a pre-Uniform Commercial Code security device whereby a security interest was taken by the mortgagee in personal property of the mortgagor."[9] A "conditional sales contract" is a "[f]orm of sales contract in which seller reserves title until buyer pays for goods, at which time, the

[9]Black's Law Dictionary 215 (5th ed. 1979).

condition having been fulfilled, title passes to buyer."[10] A "security agreement" is "[a]n agreement granting a creditor a security interest in personal property."[11] A "financing statement is used under Article 9 [of the Uniform Commercial Code] to reflect a public record that there is a security interest or claim to goods in question to secure a debt."[12] Although the Court is unable to determine precisely what a "continuation statement" is in this context, the Court will assume, at a minimum, that it relates to an extension or continuation of a security interest in personal property.[13]

Columbian produced no evidence that the Prairie State mortgage was a Title I or Title II loan. The loan at issue in this case was not a conditional sales contract. The remainder of the items contained in paragraph 4 are clearly unrelated to the mortgage and loan at issue in this case. Therefore, Columbian has failed to produce any evidence to show that Debtor made any misrepresentations in paragraph 4 of the affidavit.

Paragraph 5 of the affidavit also does not support Columbian's claim. This paragraph merely states that the affidavit is being made and delivered in connection with the sale and/or mortgage of the real estate and describes the persons for whom the affidavit is to benefit. Columbian has not shown that the Debtor made any fraudulent misrepresentations or omissions in paragraph 5 of the affidavit.

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[10] *Id.* at 267.

[11] *Id.* at 1217.

[12] *Id*. at 568.

[13] Under the Kansas UCC, K.S.A. 84-9-102(a)(27), a "Continuation statement" means an amendment of a financing statement which: (A) Identifies, by its file number, the initial financing statement to which it relates; and (B) indicates that it is a continuation statement for, or that it is filed to continue the effectiveness of, the identified financing statement.

Paragraph 6 of the affidavit contains two distinct sections. First, the affiant requests the issuance of mortgagee title insurance "without exception therein as to any possible unfiled mechanic's or materialman's liens and any unreleased improvement loans, security agreements, financing statements, continuation statements or other instruments or documents evidencing a secured interest in said real estate. . . ." Next, the affiant agrees to indemnify and hold harmless Columbian for any damages it may incur "under its said policy . . . arising, directly or indirectly, out of or on account of any such mechanic's or materialman's liens or other lien or claim or claims and/or such filings under the Uniform Commercial Code, in connection with its enforcement of its rights under this agreement." Once again, this Paragraph does not contain any fraudulent misrepresentations on the part of the Debtor.

The first part is nothing more than a request by the Debtor for the issuance of an insurance policy; it does not contain any statement by the Debtor that there are no outstanding mortgages. The second part of this paragraph is an agreement to indemnify Columbian, but also does not contain any statement by the Debtor that there are no outstanding mortgages. Nothing contained in paragraph 6 of the affidavit supports Columbian's claim that the Debtor made a fraudulent misrepresentation or omission to it in regard to the Prairie State mortgage.

Columbian also contends in the Pretrial Order that the Debtor stated in his affidavit that he would repay the first mortgage with the funds from the sale. This was not argued at trial, and the Court has reviewed the affidavit and found nothing that could be construed as such a statement. Neither Chris Scott nor Debtor, the only witnesses at the trial who were also at the closing, so testified.

Based on these findings, the Court finds that the Debtor did not make any fraudulent misrepresentations or omissions regarding the Prairie State mortgage in the affidavit. This finding is

buttressed by the general proposition that because the affidavit in question was drafted by Columbian, any ambiguities in it will be construed against the drafter, Columbian.[14]

Although these findings, alone, are sufficient to deny Columbian's objection to discharge under § 523(a)(2)(A), the Court will also address the issue of the Debtor's intent to deceive as it relates to Columbian's objection to discharge under§ 523(a)(2)(A).

2. Columbian failed to prove that the Debtor acted with the necessary intent to deceive.

Even if the Court were to have found that, by signing the affidavit, Debtor did make fraudulent misrepresentations, Columbian's claim that the debt at issue is non-dischargeable under § 523(a)(2)(A) would be rejected because it failed to prove by a preponderance of the evidence that the Debtor acted with the necessary intent. In addition to proving that the Debtor made misrepresentations, Columbian is required to show that the Debtor did so with the intent to deceive Columbian.[15] This intent may be inferred from the totality of the circumstances, or from a knowingly made false statement.[16]

Although the burden remains on Columbian to show that the Debtor acted with the required intent, the Court finds that the Debtor was able to prove, with his own uncontroverted testimony, that he did not intend to deceive Columbian. The Debtor testified that he did not read the documents at the closing prior to signing them. Instead, he did what many people do when closing on real estate, and simply signed the

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[14]*Anthony v. United States*, 987 F.2d 670, 674 (10th Cir. 1993) (holding "we are further mindful that an ambiguity is generally resolved against the drafter of the document," *quoting Milk 'N' More, Inc. v. Beavert*, 963 F.2d 1342, 1344 (10th Cir.1992)); *Metropolitan Life Ins. Co. v. Strnad*, 255 Kan. 657, 662 (1994), *citing Thomas v. Thomas*, 250 Kan. 235, 244 (1992).

[15]*See Young*, 91 F.3d at 1373.

[16]*Id.* at 1375.

documents where he was instructed to sign by the closing agent. The Debtor had closed many similar home construction deals before, and he merely signed the documents put before him and left. The Court found his testimony to be credible and undisputed. Further, the Court has found that the affidavit upon which Columbian relies did not contain any misrepresentations, even had he carefully read the documents.

Because the Debtor did not carefully scrutinize the affidavit before he signed it, and because the Court has found Columbian did not prove that Debtor made any misrepresentations when signing it, in the first instance, the Court finds that it is literally impossible for him to have intended to mislead Columbian. Columbian may have shown that the Debtor was negligent in failing to point out, at the closing, that the Summary of Seller's Transaction on the Settlement Statement did not indicate, in block 504, that there was in fact a payoff due on the first mortgage loan, but negligence is clearly not enough to meet the strict requirements of § 523(a)(2)(A).

Further, Debtor testified that even after the closing, he fully intended to pay off the mortgage note, and testified that he asked the bank for an extension of the note. That testimony was corroborated by the witness from the bank. The Court believed his testimony that his choice to use the loan proceeds to pay other Touchstone debt was not done with the requisite intent to harm Columbian. Thus, Columbian has failed to prove that the Debtor acted with an intent to deceive. Therefore, its objection to discharge pursuant to § 523(a)(2)(A) is rejected on this basis as well.

C. The Debtor did not engage in conduct that would render his debt to Columbian non-dischargeable under § 523(a)(4).

Section 523(a)(4) provides an exception to discharge from any debt for "fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." Although contained in the same section of the

Code, fraud or defalcation while acting in a fiduciary capacity, embezzlement and larceny are each distinct actions on the part of the Debtor that can lead to the non-dischargeability of debt.

1. Columbian failed to prove that the Debtor committed fraud or defalcation while acting in a fiduciary capacity.

Columbian claims that the Debtor committed fraud or defalcation while acting in a fiduciary capacity and, therefore, his debt should be non-dischargeable pursuant to § 523(a)(4). First, Columbian must prove that a fiduciary relationship existed between it and Debtor and second, it must prove that Debtor committed fraud or defalcation in the course of that fiduciary relationship.[17] Columbian contends that the Debtor's fiduciary duty arises from his position as a corporate officer and director of Touchstone, Inc., and that he breached his duty by paying off other corporate debts with the money from the sale of this real estate.

As Judge Pusateri correctly noted in denying Columbian's motion for summary judgment, the Tenth Circuit has construed § 523(a)(4) more narrowly than Columbian would like. In *Fowler Brothers v. Young (In re Young),* the Tenth Circuit discussed breach of fiduciary duty as it relates to § 523(a)(4) as follows:

> The existence of a fiduciary relationship under § 523(a)(4) is determined under federal law. However, state law is relevant to this inquiry. Under this circuit's federal bankruptcy case law, to find that a fiduciary relationship existed under §523(a)(4), the court must find that the money or property on which the debt at issue was based was entrusted to the Debtor. Thus, an express or technical trust must be present for a fiduciary relationship to exist under § 523(a)(4). Neither a general fiduciary duty of confidence, trust, loyalty, and good faith, nor an inequality between the parties' knowledge or bargaining power, is sufficient to establish a fiduciary relationship for purposes of dischargeability. Further, the fiduciary relationship must be shown to exist prior to the creation of the debt in controversy.[18]

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[17] *Id.* at 1371.

[18] *Id*. at 1371-72 (citations and internal quotation marks omitted).

Columbian has not shown that an express or technical trust was created, wherein it, or anyone else, entrusted the Debtor with money to be held in trust for the payment of the mortgage note. The fact that the Debtor may have owed some sort of general fiduciary duty to his corporation to expend the sales proceeds for corporate purposes is insufficient to establish the type of fiduciary duty that is required in the Tenth Circuit for dischargeability issues under § 523(a)(4). And there was no proof that Debtor owed any fiduciary relationship to Columbian prior to the creation of the debt in controversy.

Even if the Court were to find that the fiduciary duty owed by the Debtor to his corporation was sufficient to establish a claim under § 523(a)(4), Columbian's claim that the debt should be non-dischargeable would still be denied. In addition to proving that a fiduciary relationship exists, Columbian is required to prove that the debt in question arose as a result of fraud or defalcation while the Debtor was acting in his fiduciary relationship.[19] The evidence in this case conclusively establishes that the Debtor used the funds to repay other corporate debts, albeit not the specific corporate debt that Columbian contends it should have paid. The Debtor did not take corporate assets for his personal use, and there was no evidence that he squandered the loan proceeds on frivolous items, or that he engaged in conduct that created harm to Touchstone in any way by paying other corporate debts with the money received at the closing.

Because the Debtor's alleged fiduciary duty runs to Touchstone, not to Columbian, the Court finds that the Debtor did not commit fraud or defalcation while acting as a fiduciary to Touchstone. Because Columbian has failed to show that the Debtor engaged in any conduct that could be considered fraud or defalcation toward Touchstone, which is the alleged beneficiary of the fiduciary relationship, this objection to discharge is denied on this ground as well.

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[19] *Id*.

2. Columbian failed to prove that the Debtor committed embezzlement.

Columbian contends that the Debtor's use of the proceeds from the sale of the property, admittedly to pay other legitimate corporate debts of Touchstone, but not the debt to Prairie State, constitutes embezzlement. "[E]mbezzlement is defined under federal common law as the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come."[20] Fraudulent appropriation requires fraud in fact rather than implied or constructive fraud.[21] In order to hold that embezzlement has occurred, this definition requires a finding that a person has been entrusted with property belonging to another or that a person has come to lawfully hold property belonging to another.[22] If the Debtor is not such a person, he cannot be said to have embezzled.[23] The Court finds that Columbian has failed to prove that the sale proceeds belonged to anyone other than Touchstone and, therefore, the Debtor did not commit embezzlement when he used the sale proceeds to pay other Touchstone debt.

Columbian presented very little evidence concerning the fact that the funds from the sale of the house belonged to someone other than Touchstone. Columbian presented no evidence purporting to require Debtor or his corporation to hold in trust any of the proceeds of the sale to the Williamses. His status as President of Touchstone, by itself, is insufficient to establish a fiduciary duty covered by § 523(a)(4). In fact, it appears that Columbian intends to rely on the Debtor's statement made to a Prairie State Bank officer that

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[20]*Klemens v. Wallace (In re Wallace)*, 840 F.2d 762, 765 (10th Cir. 1988) (internal quotations omitted).

[21]*McCreary v. Kichler (In re Kichler)*, 226 B.R. 910, 914 (Bankr. D. Kan. 1998).

[22]*Id.* at 914.

[23]*Id.*

he knew he was not entitled to the funds, but used them to pay off other corporate debts anyway, and the Debtor's testimony that, in retrospect, the check should have been made payable to both Touchstone and Prairie State.

The Court finds that these statements and testimony concerning Debtor's legal obligations in regard to the proceeds from the sale of the house to not be dispositive as to the issue of whether such a legal obligation exists. Debtor is not an attorney, and his testimony, after the fact, that perhaps the check should have been made out to both Prairie State and Touchstone is insufficient to establish that such a legal obligation did in fact exist or that Touchstone was not legally entitled to the money. Furthermore, this Court agrees with Judge Pusateri'a analysis that "While the Debtor's statement that the check should have been made out to Prairie State can be interpreted as an admission that the Sale Proceeds belonged to Prairie State, it can also be interpreted to express only the Debtor's recognition that his present dispute with Columbian could have been avoided if the check had been prepared that way." (Doc. No. 28 at p. 12)

Numerous courts have refused to find embezzlement on the basis that the property belonged to the alleged wrongdoer under circumstances much more suspicious than those present in this case. For example, in *McCreary v. Kichler*, the debtor acted as a broker for the creditor in transactions involving the sale of recycled materials. The debtor would find a buyer for the products and, after being notified of the sale, the creditor would ship the materials directly to the buyer. The buyer would pay the debtor directly for the funds, and the debtor would send the funds on to the creditor. The debtor failed to remit certain funds that had been paid to it by buyers and the creditor claimed that the debtor had embezzled the money. The court held that there was nothing that created an obligation on the part of the debtor to segregate the funds that

were owed to the creditor. As a result, the court found that the property did not belong to anyone other than the debtor, and thus denied the creditor's claim of embezzlement.[24]

In the present case, the Court finds that Columbian has failed to prove that any trust agreement existed between Columbian and Debtor. The Court agrees with Columbian and Debtor that a prudent title agent closing this loan should have made the check jointly payable to Prairie State and Touchstone. The Court also accepts the fact that it is customary in the industry for home builders to use funds from the sale of the house to pay off any outstanding mortgages taken to secure the construction loan. However, neither of these facts indicate that the Debtor was legally obligated to repay the Prairie State mortgage note with these sales proceeds.

In its closing argument, Columbian likened this case to a situation where a person attempts to withdraw $100 from an ATM, but a machine malfunction causes disbursement of $1000, instead. Columbian correctly argues that the money in that situation rightfully belongs to the bank and the person who is in possession of it does not have the right to spend the money. The Court finds the example of the ATM to be factually distinguishable from this case, however, and thus unpersuasive.

In the hypothetical, the person who came into possession of the money had no rightful claim to the excess $900. Here, Touchstone had earned all the money received in exchange for the construction of the Williamses' house. The money given to Touchstone was, therefore, in exchange for the work it performed,

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[24] *Kichler*, 226 B.R. at 914-15. *See also Belfry v. Cardozo (In re Belfry)*, 862 F.2d 661 (8th Cir. 1998) (finding no embezzlement where creditor paid debtor $19,500 to restore an automobile and the debtor used the funds for other purposes) and *United American Ins. Co. v. Koelfgen (In re Koelfgen)*, 87 B.R. 993, 998 (Bankr. D. Minn. 1988) (finding no embezzlement where insurance clients paid premiums to the debtor who was to remit the premiums to the insurance company and the debtor instead used the funds for other company business).

not due to a mistake. Columbian, once it discovered its error, may have hoped and expected that Debtor would have used that money to pay off the debt. Debtor, in hindsight, recognizes that would have been the best thing for him to have done. However, the fact remains that Touchstone had a claim to that money for the goods and services it supplied to the Williamses.

Columbian has not produced, and the Court has been unable to find, any legal basis for holding that the money paid to Touchstone for the construction of the house was the property of anyone other than Touchstone. Rather, this case appears to follow the line of cases such as *Kichler*, *Belfry* and *Koelfgen* where it was clearly expected that the debtors would use funds for a certain purpose, but there was no legal or contractual obligation that they do so. Because Columbian has failed to prove that the proceeds of the sale of the real estate were not the property of Touchstone, its claim that the Debtor embezzled the funds is rejected.

3. Columbian failed to prove that the Debtor committed larceny.

Section 523(a)(4) also provides an exception for discharge as to any debt for larceny. Larceny is defined as the "fraudulent and wrongful taking and carrying away of the property of another with intent to convert it to the taker's use and with intent to permanently deprive the owner of such property."[25] "Larceny" and "embezzlement" differ primarily on whether the Debtor originally obtained the funds lawfully or not.[26]

There is no evidence that the Debtor committed larceny in this case. Columbian has never alleged that the Touchstone was not entitled to receive the funds from the sale of the property, but rather that Debtor, as President of Touchstone, should have paid those funds to retire Prairie State's mortgage note

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[25]*Bryant v. Tilley (In re Tilley)*, 286 B.R. 782, 789 (Bankr. D. Colo. 2002).

[26]*Id.* at 790.

instead of using the funds to pay other corporate obligations. Absent any evidence of unlawful taking of the property by Debtor, larceny is not present. In addition, because the Court has already found that the funds were not the property of anyone other than Touchstone, as discussed more fully in the Court's analysis of the embezzlement claim, any claim of larceny is rejected.

D. The Debtor did not engage in conduct that would render his debt to Columbian non-dischargeable pursuant to § 523(a)(6).

Columbian's final claim is that the Debtor caused a willful and malicious injury to Columbian, and as a result, the debt should not be dischargeable pursuant to § 523(a)(6). Section 523(a)(6) provides an exception to discharge "for willful and malicious injury by the debtor to another entity or to the property of another entity." In 1998, the Supreme Court held that this provision only applies to a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury.[27] The Court explained that this meant the debtor must have intended the consequences of the act he or she performed, not simply the act itself.[28] As recently noted by the Court of Appeals for the Tenth Circuit, without proof of *both* [a willful act and an malicious injury], an objection to discharge under § 523(a)(6) must fail.[29]

Columbian failed to show that the Debtor committed a willful act or caused a malicious injury under the facts of this case. The injury to Columbian that gives rise to its claim is that it was required to pay the mortgage note to Prairie State under the title insurance policy it issued, so that Prairie State would in turn release the mortgage that was creating a cloud on the title to the Williamses' home. It is clear that the

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[27] *Kawaauhau v. Geiger*, 523 U.S. 57, 60-64 (1998).

[28] *Id.* at 61-62.

[29] *Panalis v. Moore (In re Moore)*, 357 F.3d 1125, 1129 (10th Cir. 2004) (emphasis in original).

Debtor's failure to pay off this mortgage caused, at least in part, the injury. However, there is no evidence that the Debtor intended to cause injury to Columbian.

In fact, the only evidence before the Court shows the opposite is true. The Debtor testified that he had every intention of paying off the mortgage, but that the financial failure of companies owing money to Touchstone caused him to be unable to do so. He even sought an extension of the Prairie State Bank note, after the closing, to help him accomplish that. Had the Debtor been able to repay the debt as he intended, then no harm would have come to Columbian. The Court finds the Debtor's testimony on this subject to be credible and uncontroverted. Because the Debtor did not intend to cause the injury to Columbian, Columbian's § 523(a)(6) objection to discharge is denied.

III. CONCLUSION

The Court finds that the debt in question in this case is dischargeable as it does not fall within any of the exceptions to discharge raised by Columbian. Columbian failed to prove by a preponderance of the evidence that the debt in question was obtained by false pretenses, false representations or actual fraud, as required by § 523(a)(2)(A). In addition, Columbian failed to prove that the debt in this case was for fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny, as required by § 523(a)(4) or that the debt was for willful and malicious injury by the Debtor as required by § 523(a)(6). For these reasons, the Court finds that judgment should be entered in favor of the Debtor, and against Columbian, and that the debt to Columbian is in fact dischargeable.

IT IS, THEREFORE, BY THIS COURT ORDERED that judgment shall be entered in favor of the Debtor, Michael W. Utterback, and against Columbian National Title Insurance Company, on the Complaint to Determine Dischargeability of Debt Under 11 U.S.C. § 523 (Doc. 1).

IT IS FURTHER ORDERED that the debt owed by the Debtor to Columbian National Title Insurance Company is hereby discharged.

IT IS FURTHER ORDERED that the foregoing constitutes Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. A judgment based on this ruling will be entered on a separate document as required by Fed. R. Bankr. P. 9021 and Fed. R. Civ. P. 58.

IT IS SO ORDERED this _____ day of March, 2004.

_____
JANICE MILLER KARLIN
United States Bankruptcy Judge
District of Kansas

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the Memorandum and Order was deposited in the United States mail, postage prepaid on this _____ day of March, 2004, to the following:

Charles R. Hays
515 S. Kansas
Topeka, Kansas 66603

Michael W. Utterback
2534 W. 21st St.
Wichita, Kansas 67203

Joseph I. Wittman
Trustee
Columbian Building
112 SW 6th, Suite 508
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DEBRA C. GOODRICH
Judicial Assistant to:
The Honorable Janice Miller Karlin
Bankruptcy Judge